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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,  
ANDREW KOENIG, JERRY NORTON  
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED  
Defendant.

NANA REGIONAL CORPORATION and  
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

**PLAINTIFFS' OBJECTION  
TO UNDISCLOSED  
EXHIBITS AND MOTION *IN*  
*LIMINE* TO EXCLUDE  
DOCUMENTS NOT  
TIMELY DISCLOSED  
(Fed. R. Civ. Proc. 26 and 37)**

PLAINTIFFS' OBJECTIONS TO EXHIBITS AND  
MOTION IN LIMINE TO EXCLUDE DOCUMENTS

Pursuant to Federal Rules of Civil Procedure 26 and 37 and the Court's Orders of August 7, 2007 [Docket 167], August 31, 2007 [Docket 169] and September 21, 2007 [Docket 177], Plaintiffs Enoch Adams, Jr., *et al.* ("Adams"), file this Objection to Exhibits and Motion *in Limine* to exclude documents in Teck Cominco's Exhibit List which were not timely disclosed.<sup>1</sup>

## **I. INTRODUCTION**

On January 22, 2008, Teck Cominco filed its final Exhibit List. Docket 194. Plaintiffs received the list electronically on January 22 and the actual exhibits on January 23, 2008. Teck Cominco's proposed exhibits contain a series of laboratory reports, bio-monitoring reports, internal memoranda and procedures, photographs, charts and maps that are being disclosed to Adams for the first time. Such disclosure is untimely, prejudicial to Adams and without justification. As a result, Teck Cominco should be precluded from introducing at trial or using in any way the newly and untimely disclosed documents.

## **II. THE NEWLY DISCLOSED DOCUMENTS ARE PART OF A PATTERN OF LATE DISCLOSURE BY TECK COMINCO.**

This case was filed in March 2004, after the earlier, related case of *Kivalina Relocation Planning Commission v. Teck Cominco* was dismissed. Between the two cases, tens of thousands of pages of discoverable documents have been produced. Before August 31, 2007, Teck Cominco timely provided Adams with over 30,000 pages of discovery documents. Declaration of Luke Cole in Support of Objections to Exhibits and Motion in Limine to Exclude Documents not Timely Disclosed ("Cole Disclosure dec."), ¶2.

On August 9, 2007 this Court ordered Teck Cominco to "provide copies of all available monitoring reports, lab reports or other reports of the sort previously relied on in this litigation" to counsel for Adams by August 31, 2007. Docket 167 at 1. Since August 31, 2007, however, Teck Cominco has disclosed an additional 15,000 pages of new documents.

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<sup>1</sup>The Adams plaintiffs are unsure as to how the Court wanted the "objections to exhibits" it anticipated in its September 21, 2007 Pre-Trial Order [Docket 177] to be styled, and thus file this document as an "objection to exhibits and motion in limine to exclude exhibits." If this is not the style or form of objection anticipated by the Court, the Adams plaintiffs apologize.

On November 15, 2007, ten weeks after the disclosure deadline, Teck Cominco submitted Supplemental Disclosures of laboratory reports (Bates stamp pages TC 038662 RD - 045886 RD). These 7,200 pages of documents included laboratory reports from May 2005 through September 2007. Defendant Teck Cominco Alaska Incorporated's Supplemental Disclosures, Exhibit 1 to Cole Disclosure dec. Some of these documents (like September 2007 lab reports) were not available or did not exist on August 31, 2007, but the vast majority of the documents dated from 2005 and 2006 and so were available before the Court's deadline. Cole Disclosure dec. ¶4.

On January 4, 2008, Teck Cominco provided additional laboratory reports and updated financial statements (Bates stamp pages 045887 - 50582 RD). Letter of Rachel Davis to Luke Cole, Exhibit 2 to Cole Disclosure dec. These 4,700 pages of documents were largely pre-August 2007 lab reports. Cole Disclosure dec. ¶6. Teck Cominco claimed that the additional laboratory reports "were inadvertently missed by the copy company." Exhibit 2 to Cole Disclosure dec.

The November 15 and January 3 supplemental disclosures, while untimely, are largely not challenged here. Here, Adams challenges Teck Cominco's January 22, 2008 Exhibit List, which contains dozens of *new* documents, including lab reports, biomonitoring reports, internal memoranda and procedure documents, photographs, maps & charts, *never previously disclosed to Adams*.<sup>2</sup> These include lab reports from as far back as 2000 that Teck Cominco has suddenly disclosed at the eleventh hour. See, e.g., Teck Cominco Exhibit List, Exhibit 1116 (August 2000 lab report).

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<sup>2</sup>Several of the studies, as well as the photographs, were made available by Teck Cominco for brief review by Adams's counsel on January 18, 2008, during exhibit review at the offices of Hartig Rhodes. In the context of that review (of all of the exhibits to be filed by all parties in this case) it was impossible for Adams's counsel to actually read or analyze the documents. Cole Disclosure dec. ¶7.

The late-breaking or never-before-disclosed documents are easy to spot on Teck Cominco's Exhibit List: they have Bates stamp numbers higher than 50582, the last number in the disclosures that Adams received on January 4, 2008 (see Exhibit 2 to Cole Disclosure dec.), or they have no Bates stamp numbers at all. Cole Disclosure dec. ¶8.

While Adams was patient with the 7,200 pages of late documents disclosed in November 2007 and the almost 5,000 additional pages disclosed in January 2008 (this month!), disclosing thousands of additional pages on the day *after* final witness lists and exhibit lists are due is simply not fair.

Adams challenges the following exhibits, grouped by category:

Lab Reports		
Exhibit No.	Description	Bates No.
1116	Final Report-Toxicity Evaluation of Outfall 001 to Ceriodaphnia by Parametrix dated August 2000	TC 051054-51090 RD
1218	Short-Term Chronic Toxicity of Effluents from Red Dog Mine to Pimephales promelas by ENSR dated July 2002	TC 051134-51373 RD
1230	Report of Short-Term Chronic Toxicity Testing using Ceriodaphnia by ENSR dated September 6, 2002	TC 051374-51444 RD
1231 <sup>3</sup>	Bioassay Report conducted August 7 through 14, 2002 by CH2MHill dated August 2002	TC 051733-51766 RD
1232 <sup>4</sup>	Bioassay Report conducted August 30 through September 3, 2002 by CH2MHill dated September 4, 2002	TC 051767-51798 RD
1264	Short-Term Chronic Toxicity of Effluents from Red Dog Mine to Ceriodaphnia by ENSR dated October 2002	TC 051858-52087 RD
1341	Report of Short-Term Chronic Toxicity Testing using Ceriodaphnia by ENSR dated August 2004	TC 051017-51053 RD
1635	Acute Toxicity of Effluent from Red Dog Mine, Port Outfall 001 & 005 to Mysid Shrimp by ENSR dated July/August 2001	TC 052088-52146 RD

<sup>3</sup> Exhibit labeled 2231.

<sup>4</sup> Exhibit labeled 2232.

**Lab Reports**

1636	Acute Toxicity of Effluent from Red Dog Mine, Port Outfall 001 & 005 to Topsmelt by ENSR dated July/August 2001	TC 052147-52208 RD
1637	Acute Toxicity of Effluent from Red Dog Mine, Port Outfall 001 & 005 to Mysid Shrimp by ENSR dated August 2001	TC 052209-52338 RD
1638	Acute Toxicity of Effluent from Red Dog Mine, Port Outfall 001 to Topsmelt by ENSR dated September 2001	TC 052339-52399 RD

**Internal Memoranda and Procedures**

1648	Discharge TDS SOP	NA
1649	Sodium Sulfide Dosage Changes SOP dated 2003	NA
1651	Sodium Sulfide System Process Description	NA
1652	In-stream Control of TDS at Red Dog Mine	NA

**Biomonitoring Studies**

1656	2000 Aquatic Biomonitoring at Red Dog Mine dated May 15, 2001	NA
1658	2002 Aquatic Biomonitoring at Red Dog Mine dated 2003, Report No. 03-03	NA
1663	2006 Aquatic Biomonitoring at Red Dog Mine dated June 2007, Report No. 07-03	NA

**Photos**

1671	Aerial View of Red Dog Creek pre-mining	NA
1672	Aerial View of Tailings pond	NA
1673	Aerial View of Outfall 001	NA
1674	Side View of Outfall 001	NA
1675	Area map of Red Dog Mine	NA
1676	Red Dog Mine Mixing Zones: Sta. 150, 9 & 10	NA
1677	Red Dog Mine Mixing Zones: Sta. 151, 20, 12	NA

Photos		
1678	Origin of the Opportunity photograph	NA
1679	Water Balance, Tailings pond diagram	NA
1680	Map of TDS Limits	NA
1681	Graph: Impoundment TDS 1999-2007	NA
1682	Chart: Discharge Performance by Month to Red Dog Creek	NA
1683	Pond Elevation Since 1998	NA
1684	Photograph of Red Dog Clean Water Bypass/Diversion System	NA
1685	Photographs of Middle Fork-Before and After	NA
1686	Red Dog Operations tailings impoundment photograph	NA
1687	Photograph of Sulfur Creek, pre-mining	NA
1688	Photograph of Alvinella Seep	NA
1689	Photograph of Red Dog Diversion	NA
1690	Photograph of Clean Water Bypass Upgrades	NA
1691	Photographs of Clean Water Bypass Upgrades 4	NA
1692	Diversion Ditch 4 Construction	NA
1693	Tailing Pond & Dam Locations Map	NA
1694	Back Dam Diagram	NA
1695	Photograph of Water Treatment Plants	NA
1696	Photograph of Fourth Sandfilter	NA
1697	Photograph of New Sandfilter Building	NA
1698	Photograph of Water Treatment Plant 3	NA
1699	Aerial photograph of Outfall 001	NA
1700	Water Management Diagram of tailings impoundment	NA
1701	Map: Streams and Sample Locations in the Immediate Vicinity of Red Dog Mine	NA
1702	Map: Streams and Rivers Downstream of Red Dog Mine	NA

Photos		
1703	Photograph of Middle fork Red Dog Creek at point where effluent enters creek dated July 1995	NA
1704	Map: Red Dog Creek identification of TDS zones	NA
1705	Map: Red Dog Creek identification of spawning areas	NA
1741	Oversize Map of Red Dog Mine Environmental Stations	NA
1742	Oversize Map of Red Dog Mine Environmental Stations including Station 1 and Chukchi Sea	NA
1743	Oversize Map of Kivalina Area Use	NA
1744	Oversize Map of Kivalina Community	NA

Charts		
1664	Chart: Sulfate & TDS at Station 1 & 2	NA
1665	Chart: Total Cyanide and WAD Cyanide at Station 2	NA
1666	Chart: Total Cyanide and Wad Cyanide at Station 2	NA
1667	Graph: Comparison of Returns - Actual Dow Jones v. Kavanaugh Assumptions July 1, 1999-January 11, 2008	NA
1668	Chart: Summary of Economic Benefit Results Using The correct Financial Methodology	NA
1669	Chart: Methodology that disregards the Distinction Between Ex-Post and Ex-Ante Information	NA
1670	Chart: Economic Benefit Methodology Based on the Distinction Between Ex-Post and Ex-Ante	NA
1707	Chart: Station 1 Average TDS 1991 to 2005	NA
1708	Chart: Station 1 Average TDS 1999 to 2005	NA
1709	Spreadsheet: TDS Data Station 10 for 2002 and 2003	NA
1710	Spreadsheet: Estimated TDS Concentration at Station 10 on July 7, 1999	NA
1711	Figure 104: Dolly Varden Kidney Tissue, Cadmium	NA

1 **III. THIS COURT SHOULD EXCLUDE TECK COMINCO'S UNTIMELY**  
 2 **DISCLOSURES.**

3 **A. Teck Cominco's January 22, 2008 Disclosure of Additional Documents was**  
 4 **Untimely.**

5 Federal Rule of Civil Procedure 26 requires a party, "without awaiting a discovery  
 6 request," to provide other parties with "a copy – or a description by category and location – of all  
 7 documents, electronically stored information, and tangible things that the disclosing party has in  
 8 its possession, custody, or control and may use to support its claims or defenses, unless the use  
 9 would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(B). Rule 26 also requires a party to  
 10 automatically supplement its disclosures whenever it learns that the information disclosed is  
 11 "incomplete or incorrect." Fed. R. Civ. P. 26(e)(1).

12 Initial disclosures under Rule 26 are "designed to facilitate the parties' understanding of  
 13 the case early on and to inform the appropriate scope of discovery." *Neothermia Corp. v.*  
 14 *Rubicor Med., Inc.*, 345 F. Supp. 2d. 1042, 1045 (N.D. Cal. 2004). As such, supplements to  
 15 initial disclosures under Rule 26(e) must be made promptly. *Id.*; Fed. R. Civ. P. 26 Advisory  
 16 Committee's Note (supplementation should be made with special promptness as the trial date  
 17 approaches). This Court's Order dated August 9, 2007 set August 31, 2007 as the deadline for  
 18 such disclosures. Docket 167 at 1. Despite the unambiguous mandate in the Federal Rules and  
 19 direct instruction by the Court, Teck Cominco did not disclose the documents discussed below  
 20 during the discovery period, but has included them in its Exhibit List and disclosed them to  
 21 Adams for the first time on January 23, 2008 – almost five months after the discovery deadline.

22 To ensure compliance with the discovery requirements of Rule 26, Rule 37 provides that  
 23 a party who "fails to provide information . . . as required by Rule 26(a) or (e), . . . is not allowed  
 24 to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the  
 25 failure is substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "Exclusion is  
 26 "automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a)  
 27 was either justified or harmless." *Salgado by Salgado v. GMC*, 150 F.3d 735, 742 (7th Cir.  
 28 1998). Exclusion of undisclosed documents is proper even where the failure to disclose was not



1 due to the defendant's bad faith or willfulness. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,  
2 259 F.3d 1101, 1106 (9th Cir. 2001). Teck Cominco's untimely disclosure, made without notice  
3 and after the discovery deadline is prejudicial to Adams and without substantial justification.  
4 Thus, Teck Cominco should be precluded from introducing the untimely disclosed documents at  
5 trial.

6 **B. Teck Cominco's Untimely Disclosure Harms Adams and is Without**  
7 **Substantial Justification.**

8 The Adams plaintiffs have expended considerable time and expense in developing the  
9 factual basis of this case, including deposing numerous Teck Cominco staff. Teck Cominco's  
10 failure to timely disclose documents has prejudiced Adams' ability to respond in an adequate and  
11 timely manner to Teck Cominco's proposed evidence. Adams was unable to share the  
12 documents with its experts or fact witnesses before final witness lists disclosing their testimony  
13 had to be filed, and before final expert reports were due. Adams was not able to ask deposition  
14 questions during the discovery phase about the lab reports from the early 2000s. Cole Disclosure  
15 dec. ¶9.

16 By this Court's Order, Teck Cominco was required to provide "copies of all available  
17 monitoring reports, lab reports or other reports of the sort previously produced in this litigation"  
18 to counsel for Adams by August 31, 2007. Order, August 9, 2007, Docket 167 at p.1. All of the  
19 lab reports included in Teck Cominco's Exhibit List but not previously disclosed were prepared  
20 at least *three years* prior to August 2007. The proffered biomonitoring studies were also  
21 completed well before the discovery exchange cutoff date. These studies and reports are "of the  
22 sort previously produced in this litigation" and thus were subject to the deadline in this Court's  
23 Order. Docket 167 at 1. Teck Cominco was certainly aware of, or in possession of, these  
24 documents well before August 2007. Yet, Teck Cominco did not disclose the reports until  
25 January 22, 2008. Teck Cominco chose to disclose the reports only *after* the close of discovery,  
26 long after all final depositions were taken and after the deadline for filing all final expert reports,  
27 and lists of trial exhibits and witnesses. As a result, Adams is deprived of an opportunity to  
28 respond to the new evidence before trial. Cole Disclosure dec. ¶9.

1 Teck Cominco's proffered exhibits also include explanatory charts and photographs and  
 2 maps of the Red Dog Mine, various sites at the mine, and the surrounding area and community.  
 3 While some of the photographs are dated (Exhs. 1681, 1683, 1703) Adams is not informed as to  
 4 when the rest of the photographs were taken, or by whom. Further, because Teck Cominco did  
 5 not disclose these photographs, charts or maps to Adams before January 22, 2008, Adams was  
 6 deprived of an opportunity to share them with expert or fact witnesses, or depose any Teck  
 7 Cominco witnesses about them. Cole Disclosure dec. ¶9. Teck Cominco's failure to disclose is  
 8 prejudicial to Adams' prosecution of this case and should not be rewarded.

9 Teck Cominco offers no justification for its failure to disclose these documents and did  
 10 not give Adams more than three days' notice that the Exhibit List would contain previously  
 11 undisclosed documents – indeed, for the vast majority of these documents, it gave Adams no  
 12 notice at all.<sup>5</sup> Teck Cominco failure to comply with this Court's Order and Rule 26 harms  
 13 Adams and is without substantial justification.

14 Pursuant to Rule 37(c)(1), Teck Cominco should be precluded from introducing the  
 15 untimely disclosed documents at trial. Teck Cominco should not be rewarded for its delay.  
 16 Timely updates to Rule 26(a)(1) initial disclosures permit the other side to examine documents  
 17 prior to trial and to share those documents with its expert and fact witnesses. Here, however,  
 18 where the Adams plaintiffs have already submitted final expert reports and final exhibit and  
 19 witness lists, they are deprived of the opportunity to review the documents with their witnesses  
 20 before trial. If parties were permitted to conduct themselves as Teck Cominco has, no litigant  
 21 would make any disclosures until the last possible moment before trial, thus ensuring that their  
 22 adversaries have no opportunity to examine documents they intend to introduce at trial. Rules 26  
 23 and 37 do not permit this unfair litigation tactic.

24 Adams thus seeks an Order excluding from trial exhibits not timely disclosed by Teck  
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26 <sup>5</sup>As noted above, several of the documents were first revealed to Adams's counsel on  
 27 January 18, 2008 during exhibit review; the vast majority of the exhibits listed above, however,  
 28 were revealed to Adams for the first time on January 22, 2008 in Teck Cominco's exhibit list.

Cominco. Respectfully submitted this 29th day of January, 2008.

/S/ Luke Cole  
\_\_\_\_\_  
Luke Cole  
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January 2008, a true and correct copy of the foregoing Objections to Exhibit List and Motion to Exclude Undisclosed Documents was served, via electronic mail, on the below identified parties of record:

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\_\_\_\_\_  
/S/

Luke Cole